76

Supreme Court, U.S.
FILED

No. 07-(1)

07-789 DEC 10 2007

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

John W. Courtney, Frances T. Lax, Lawrence M. Green, and Irene Kortas, on behalf of themselves and all others similarly situated, The uninsured depositors in Superior Bank, FSB,

Petitioners,

v.

Penny Pritzker, Thomas J. Pritzker, Alvin Dworman, Coast-to-Coast Financial Corporation, Ernst & Young LLP, Federal Deposit Insurance Corporation, in its corporate capacity, Neal T. Halleran, William C. Bracken, Monte Kurs, Nelson L. Stephenson, Glen Miller, Marc A. Weisman, Steven Mann, Walter F. Rusnak, and all other unknown defendants,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GEORGE B. COLLINS
COLLINS & BARGIONE
One North LaSalle Street
Suite 2235
Chicago, Illinois 60602-3908
(312) 372-7813

JEFFREY M. FRIEDMAN
LAW OFFICE OF
JEFFREY FRIEDMAN, P.C.
120 South State Street
Suite 200
Chicago, Illinois 60603
(312) 357-1431

CLINTON A. KRISLOV
Counsel of Record
KRISLOV & ASSOCIATES, LTD.
20 North Wacker Drive
Suite 1350
Chicago, Illinois 60606
(312) 606-0500

Counsel for Petitioners

QUESTION PRESENTED

Whether the FDIC's agreement with the shareholders of failed bank Superior Bank, to allocate recoveries from a failed bank's accountants to the bank's shareholders while depositors remain unpaid, exceeds the agency's authority and violates the 12 U.S.C. § 1821(d)(11)(A) Depositor preference provisions which require that "amounts realized from the . . . resolution of" an insured bank "shall be distributed" to repay deposit liabilities (priority ii) ahead of any obligations to shareholders (priority v).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	17
I. Review is necessary to declare that Congress' statutory payout priorities are mandatory, not subject to FDIC discretion; that the FDIC's § 12 U.S.C. § 1821(d)(2)(G) power to transfer assets of a failed bank does not permit it to distribute recoveries favoring shareholders over depositors, contrary to § 1821(d)(11)'s "absolute priority" statutory priorities. The decision below conflicts with decades of bankruptcy law precedent, as well as the Claims Court's limit on the FDIC's authority.	17

Contents

Page

A. The FDIC's Statutory Powers and Functions. 17

B. FIRREA's Absolute Priority Rule for distributions from FDIC Receiverships. 18

C. The FDIC's general power to act as a receiver or transfer assets does not confer authority or discretion to distribute assets differently from the statutory priorities. 21

II. The FDIC's Agreement with the Pritzker/Dworman shareholders is subject to court review because the FDIC's action was outside its authority. 24

A. Where the FDIC Acts Outside, or Contrary to, its Statutory Powers, Courts May Review and Remedy the FDIC's Actions. 24

B. Section 1821(j)'s bar of judicial review of FDIC action does not bar judicial review because the Statutory Preference for Depositors is mandatory by operation of Law. 28

Contents

Page

III. Review is warranted to support the rule of law in Failed Bank Resolutions under FIRREA, and to declare that no "wealthy investor" exception exists to the liquidation priorities. 30

Conclusion 32

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided May 7, 2007 ..... 1a

Appendix B — Judgment Of The United States District Court For The Northern District Of Illinois, Eastern Division 21a

Appendix C — Order Of The United States District Court For The Northern District Of Illinois, Eastern Division Dated July 27, 2005 ..... 23a

Appendix D — Order Of The United States Court Of Appeals For The Seventh Circuit Denying Petition For Rehearing Filed July 20, 2007 .. 29a

TABLE OF CITED AUTHORITIES

Page

Cases:

Adagio Investment Holding Ltd. v. FDIC, 338 F. Supp. 2d 71 (D.D.C. 2004) 21, 22

All Winstar-Related Cases at the Court v. United States, 44 Fed. Cl. 3 (Fed. Cl. 1999) 26, 27

Brady Dev. Co., Inc. v. RTC, 14 F.3d 998 (4th Cir. 1994) 17

California Housing Securities, Inc. v. United States, 959 F.2d 955 (Fed. Cir. 1992) 26-27

Coit Independence Joint Venture v. FSLIC, 489 U.S. 561, 109 S. Ct. 1361, 103 L. Ed. 2d 602 (1989) 25, 29-30

In re Colonial Realty Co., 980 F.2d 125 (2d Cir. 1992) 28

Courtney et al. v. Halleran et al., 2004 WL 2095674 (N.D. Ill. Sept. 17, 2004) 1, 12

Courtney et al. v. Halleran et al., 485 F.3d 942 (7th Cir. 2007) 1, 16

E.I. du Pont de Nemours & Co. v. FDIC, 32 F.3d 592 (D.C. Cir. 1994) 22

Cited Authorities

	Page
Federal Deposit Ins. Corp. v. Ernst & Young LLP, 256 F. Supp. 2d 798 (N.D. Ill. 2003)	12
FDIC v. Ernst & Young LLP, 374 F.3d 579 (7th Cir. 2004)	12, 25
Gaff v. FDIC, 919 F.2d 384 (6th Cir. 1990)	20
Gross v. Bell Savings Bank PA SA, 974 F.2d 403 (3d Cir. 1992)	28
In re Kmart Corp., 359 F.3d 866 (7th Cir. 2004)	23
LaSalle Talman Bank, F.S.B. v. United States, 317 F.3d 1363 (Fed.Cir. 2003)	5-6
Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803)	24
Matter of Hartman Bros. Constr. Corp., 835 F.2d 1215 (7th Cir. 1987)	26
National Trust for Historic Preservation v. FDIC, 995 F.2d 238, 301 U.S. App. D.C. 338 (D.C. Cir. 1993)	25
National Union Fire Ins. Co. v. City Savings, F.S.b., 28 F.3d 376 (3rd Cir. 1994)	20

Cited Authorities

	Page
Office of Personnel Management v. Richmond, 496 U.S. 414, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990)	25
Rechler Partnership v. Resolution Trust Corp., No. 90-3091, 1990 WL 711357 at *2 (D.N.J. Sept. 7, 1990)	28, 29
Sharpe v. FDIC, 126 F.3d 1147 (9th Cir. 1997)	25
Constitutional and Statutory Provisions	
Constitution, Art. I, § 9, cl. 7	25
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, P.L. 101-73, 103 Stat. 183.§212(a)	19
P.L. 103-66, §3001(a)	19
5 U.S.C. § 8912	4
12 U.S.C. § 1811	17
12 U.S.C. § 1815(e)(2)(C)	2, 19
12 U.S.C. § 1819	2, 24
12 U.S.C. § 1821(a)(1)(A)	17
12 U.S.C. § 1821(d)	12, 17

Cited Authorities

Page

12 U.S.C. § 1821(d)(2)(A)(I) 21

12 U.S.C. § 1821(d)(2)(G) 2, 17, 21, 22

12 U.S.C. § 1821(d)(11)(A) ..... *passim*

12 U.S.C. § 1821(f) 17

12 U.S.C. § 1821(j) 3, 13, 15, 28, 30

12 U.S.C. § 1821(p)(3) 4, 22

Miscellaneous Authorities:

Johnson, Christian A., Justice and the Administrative State: The FDIC and the Superior Bank Failure, 36 Loyola Univ. Chicago L. J. 483 (2005) 30

Special Commentary: Construction and Application of Absolute Priority Rule in Confirmation of Plan Under Chapter 11 of Bankruptcy Code of 1978 (11 U.S.C.A. § 1129(b)(2)). 175 ALR Fed. 485 18

"Analysis of the Failure of Superior Bank, FSB", Statement of Thomas J. McCool, GAO Managing Director, Financial Markets and Community Investment, GAO-02-419T 7

Cited Authorities

Page

FDIC Failed Bank website for Superior Bank: *http://www.fdic.gov/bank/individual/failed/superior.html* and for balance sheet reports of assets and remaining claims: *http://www.fdic.gov/bank/individual/failed/superiorbalsheet.html* 14

"Maybe they'll get a Toaster", Chicago Tribune editorial, January 29, 2005 30

Office of Inspector General, U.S. Department of the Treasury, "Follow-On Report to the Material Loss Review of Superior Bank, FSB, OIG-02-111, August 20, 2002, *Http://www.treas.gov/inspector-general/audit-reports/2002/oig02111.pdf* 8

OTS/FDIC December 10, 2001 Agreement with the Pritzker/Dworman/CCFC shareholder group, *http://www.ots.treas.gov/docs/7/77184.html* 10-11

"Savings and Loan Crisis," *http://*en.wikipedia.org/wiki/Savings_and_Loan_crisis (visited April 24, 2007); Fed. Deposit Ins. Corp., "The S & L Crisis: A Chrono-Bibliography," *http://*www.fdic.gov/bank/historical/s&l (FDIC Chronology) (visited April 24, 2007) 5

Cited Authorities

Page

Statement of John Reich, director, FDIC, on The Failure of Superior Bank, FSB, before the U.S. Senate, Committee on Banking, Housing and Urban Affairs, September 11, 2001. *http://www.ots.treas.gov/docs/4/48871.pdf.* 6-7

Testimony (by Ellen Seidman, Director, Office of Thrift Supervision) on the Failure of Superior Bank, Federal Savings Bank before the Committee on Banking, Housing, and Urban Affairs, United States Senate, September 11, 2001 (estimating $500 million loss to the government's SAIF fund.) 10

Research Report, "The FDIC and Recent Bank Failures", American Institute for Economic Research, September 10, 2001, with inset article "Is Another Banking Crisis Looming?" *www.aier.org/publications/2001pubs/RR17.pdf.* 6

John W. Courtney, Frances T. Lax, Lawrence M. Green and Irene Kortas, on behalf of themselves and all others similarly situated (the "under insured" depositors of Superior Bank FSB, a failed bank) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is published as *Courtney et al. v. Halleran et al.*, 485 F.3d 942 (7th Cir. 2007). The Seventh Circuit's denial of Petition for Reconsideration and Rehearing *en banc* is unreported. The district court's memorandum and order granting petitioner's motion to dismiss is unreported, but can be found at *Courtney et al. v. Halleran et al.*, 2004 WL 2095674, (N.D. Ill. Sept. 17, 2004). *See* Appendices A - D.

STATEMENT OF JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

The Seventh Circuit's opinion was rendered on May 7, 2007 (App. A). The Petition for Panel Rehearing with suggestion for Rehearing *En Banc* was denied on July 12, 2007. (App. C).

On October 4, 2007, Mr. Justice Stevens granted petitioners' application (07A288) extending the time to file a petition for a writ of certiorari until December 9, 2007 (a Sunday).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1819(a)

> [The] . . . Corporation [FDIC] . . . shall have power—
>
> . . .
>
> Ninth. To act as receiver.

12 U.S.C. § 1821(d)(2)(G). Merger; transfer of assets and liabilities

> (I) In general
>
> The Corporation may, as conservator or receiver—
>
> . . . (II) subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.

12 U.S.C. § 1821(d)(11). Depositor preference

> (A) In general
>
> Subject to section 1815(e)(2)(C) of this title [relating to losses incurred by the FDIC], amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims

(other than secured claims to the extent of any such security) in the following order of priority:

> (I) Administrative expenses of the receiver.
>
> (ii) Any deposit liability of the institution.
>
> (iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).
>
> (iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).
>
> (v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

12 U.S.C. § 1821(j). Limitation on court action

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

12 U.S.C. § 1821(p)(3). Settlement of claims

> Paragraphs (1) [prohibiting the sale of assets of a failed institution to certain persons] and (2) [forbidding debtors convicted of certain crimes from buying assets] shall not apply to the sale or transfer by the Corporation of any asset of any insured depository institution to any person if the sale or transfer of the asset resolves or settles, or is part of the resolution or settlement, of—
>
> > (A) 1 or more claims that have been, or could have been, asserted by the Corporation against the person; or
> >
> > (B) obligations owed by the person to any insured depository institution, the FSLIC Resolution Fund, the Resolution Trust Corporation, or the Corporation.

5 U.S.C. § 8912:

> The district courts of the United States have original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States founded on this chapter.

STATEMENT OF THE CASE

This is an action by depositors in Superior Bank FSB which failed, leaving depositors unpaid approximately $54 million as of the date of the FDIC's receivership, of which approximately $20 million remains unpaid. The issue upon which certiorari is sought is a challenge to the FDIC's agreement to allocate a portion of its recovery from the bank's accountants to Superior's shareholders, while Superior's depositors remained unpaid, in violation of FIRREA's statutory "depositor preference" priorities.

I

The Savings and Loan Crisis, and the Phoenix program. During the latter part of the 1980s, more than a thousand savings and loan associations in the United States failed. *See* "Savings and Loan Crisis," http:// en. wikipedia. org/ wiki/ Savings_ and_ Loan_ crisis (visited April 24, 2007); Fed. Deposit Ins. Corp., "The S & L Crisis: A Chrono-Bibliography," http://www.fdic.gov/bank/ historical/s & l/ (FDIC Chronology) (visited April 24, 2007). The rate of failure was so great that the General Accounting Office (now known as Government Accountability Office (GAO) declared the Federal Savings & Loan Insurance Corporation (FSLIC) fund insolvent by at least $3.8 billion in January 1987. *See* FDIC Chronology. During this crisis, the Federal Deposit Insurance Corporation (FDIC) had organized a program that permitted the consolidation of several filing or failed thrift organizations into one larger entity, which (the FDIC hoped) would enjoy greater economies of scale and which would be eligible for significant government assistance. *See LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1366-67 (Fed.

Cir. 2003). It dubbed this the "Phoenix program." *See id.*, at 1366.

The Pritzker/Dworman acquisition and Resurrection of the failed Lyons Savings Bank as Superior Bank FSB. Under the Phoenix program, members of the Pritzker family (Penny and Thomas Pritzker) combined 50/50 with Alvin Dworman, a New York real estate developer and Pritzker friend, to acquire the Lyons (Illinois) Savings Bank, which had failed in December 1988. Creating a holding company, Coast-to-Coast Financial Corporation (CCFC), the Pritzker/Dworman group, acquired Lyons at the end of 1988 paying only $42.5 million cash, and receiving an "assistance" package from the FSLIC, of $645 million in cash, tax credits, and loan guarantees.

Superior's high risk subprime[1] lending venture. After the take-over, Superior aggressively entered the now well-known "subprime" lending market[2], began

---

1. While the current and still-expanding subprime economic crisis has taken most of the country by surprise, there were some commentators who identified the 2001 Superior Bank catastrophe as the portend tip of what has unfolded six years later. *See* Research Report, "The FDIC and Recent Bank Failures", American Institute for Economic Research, September 10, 2001, with inset article "Is Another Banking Crisis Looming?" www.aier.org/publications/2001pubs/RR17.pdf.

2. For a description of Superior Bank's subprime lending-generated failure, along with "lessons learned" that appear to have been generally ignored in producing the country's current subprime mess, *see* Statement of John Reich, director, FDIC, on The Failure

(Cont'd)

accumulating high-risk assets associated with retained interests in mortgage securitizations. Essentially, Superior made high-risk loans to an auto or home buyer with a poor credit history; then pooled groups of these loans and sold the portfolios to investors. Superior then collected the income due from the underlying loans, and paid a fixed rate of return to the investors. Whether this was potentially profitable or not, Superior's business strategy required it to aggressively attract deposits, by offering high CD rates and promising greater-than-actual FDIC insurance coverage; profiting by lending the money out at higher risk rates, and securitizing and selling the loans to others.

Plaintiffs-Depositors and their claims. The plaintiffs were "under-insured" depositors (i.e., holders of deposits in excess of the then-$100,000 FDIC insured amount) of Superior, whose claims, originally filed in Illinois Circuit Court, but later removed to the United States District Court for the Northern District of Illinois, were threefold.

First, they assert that Superior's officers and outside accountants defrauded them into depositing money into the bank, by misrepresentation of the bank's solvency

---

(Cont'd)

of Superior Bank, FSB, before the U.S. Senate, Committee on Banking, Housing and Urban Affairs, September 11, 2001. *http://www.ots.treas.gov/docs/4/48871.pdf.*

See also "Analysis of the Failure of Superior Bank, FSB", Statement of Thomas J. McCool, GAO Managing Director, Financial Markets and Community Investment, GAO-02-419T. Http://www.gao.gov/new.items/d02419t.pdf.

and their ability to structure deposits to enjoy greater coverage than the $100,000 FDIC insurance amount.

Second, they claim that the CCFC group plundered Superior's assets by withdrawing excessive amounts of money from the bank and by engaging in self-interested transactions with it. For example, they charge that the CCFC principals took out large loans to themselves from Superior that they had no intention of repaying, and additionally drained Superior's assets by directing Superior to pay CCFC $188 million in dividends, supported by fictitious earnings over the ten-year period from 1989 to 1999[3]. Eventually, Superior was closed and taken over by the FDIC in its receiver capacity.

Their third claim is that the FDIC's Agreement with the Bank's Shareholders to assign them a portion of the FDIC's recovery from the Bank's accountants violates the statutory "Depositor Preference" distribution priorities.

According to plaintiffs' complaint, the CCFC group initially was able to conceal its misfeasance in several ways. First, its auditors, the accounting firm of Ernst & Young, allegedly cooperated in the cooking of Superior's books so that they reflected vastly inflated values for

---

3. These are documented in a number of sites. *See, e.g.*, Office of Inspector General, U.S. Department of the Treasury, "Follow-On Report to the Material Loss Review of Superior Bank, FSB, OIG-02-111, August 20, 2002, identifying "Questionable Holding Company Transactions" and "Insider Abuse and Fraud" that were ignored for years until after Superior's closing. Http://www.treas.gov/inspector-general/audit-reports/2002/oig02111.pdf.

the bank's assets. Based on Ernst & Young's purported conclusions, the CCFC group and the Bank defendants made statements to depositors designed to assure them that Superior was financially sound. Plaintiffs also allege that the Bank defendants misrepresented the availability of FDIC insurance to existing and potential depositors. They charge that the Bank defendants told them that if they opened up multiple accounts in different names, then each account would be insured up to the maximum permitted by the FDIC. This was inaccurate, but, in reliance on this advice, the plaintiffs were duped into depositing far more than the maximum that could be insured, just when Superior was about to fold.

The OTS/FDIC's closure of Superior, appointment of FDIC Receiver. By 1998, Superior's mismanagement could no longer be ignored. The Office of Thrift Supervision (OTS) and the FDIC began to investigate, and they determined that several of Superior's audited financial statements significantly overstated the value of its assets. In January 2001, Ernst & Young conceded that its accounting treatment of Superior's retained interests was incorrect, and it agreed to re-evaluate its conclusions. That led to a writedown of Superior's retained interests first by $270 million, and later by another $150 million. Insolvency followed soon thereafter; on July 27, 2001, the OTS closed the bank, and appointed the FDIC receiver for Superior. The receiver transferred all insured deposits (that is, accounts that had up to $100,000 in them) to a new entity, Superior Federal, leaving $49 million of uninsured deposits unpaid, and began pursuit of those liable for the bank's re-collapse.

The Pursuit of Responsible Parties. The FDIC-as receiver, began pursuit of Superior's claims against those responsible for the bank's collapse, which eventually amounted to nearly the largest single claim on federal insurance funds since the depression[4].

The FDIC Settlement with the Pritzker/Dworman Shareholder Group. On December 10, 2001, the FDIC entered into an agreement with the Pritzkers and Dworman shareholder group, absolving them of their potential liability of $900 million ($600 million initial package plus $180 million in unearned dividends plus Dworman's $100 million loan), in exchange for: (a) $100 million to be paid in cash, plus $360 million in future payments, without interest, over a fifteen year period, plus (b) an agreement to jointly[5] sue Ernst & Young, the Bank's accountants, and allocating to the Pritzker/Dworman shareholder group: 25% of "any and all Case Proceeds recovered by any Agency Party in respect of the E&Y claims . . . , and 50% of the "amount, if any, by which (i) all civil money penalties recovered in respect of the E&Y Claims through an action by the OTS exceed (ii) five percent (5%) of the Case Proceeds theretofore recovered by any Agency Party in respect of the E&Y

4. *See* Testimony (by Ellen Seidman, Director, Office of Thrift Supervision) on the Failure of Superior Bank, Federal Savings Bank before the Committee on Banking, Housing, and Urban Affairs, United States Senate, September 11, 2001, at 4 (estimating $500 million loss to the government's SAIF fund.). Http://www.ots.treas.gov/docs/8/87089.pdf.

5. It is uncertain what damage claims the shareholder group could have asserted against the accountants whose book-cooking had enabled the shareholder group to obtain $188 million in unsupported dividends and conceal a $100 million insider loan.

Claims . . ." . (R.42; *Id.* ¶ 88; *Agreement between FDIC & Pritzker/Dworman Groups* ("FDIC Settlement")). (Full copies of the Agreement and attachments are available at the Office of Thrift Supervision's Website. http://www.ots.treas.gov/docs/7/77184.html).

Depositors challenge the Agreement's allocation to shareholders while depositors remain unpaid. Plaintiffs Depositors challenged the agreement, and sought to enjoin the operation of the provision allocating part of the recovery to the shareholder group, asserting that payment of such recoveries to shareholders while depositors remain unpaid violates the statutory priorities of FIRREA's Depositor preference, 12 U.S.C. § 1821(d)(11), provisions, under which "amounts realized from the resolution of any depository institution by any receiver . . . shall be distributed to pay claims . . . in the following order of priority:

> (i) Administrative expenses of the receiver.
>
> (ii) Any deposit liability of the institution.
>
> (iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).
>
> (iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).
>
> (v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any

depository institution holding company or any shareholder or creditor of such company).

Initially, the District Court dismissed the claims and declined to enjoin the agreement as unripe unless and until a recovery was obtained from the accountants and it was distributed contrary to the statute, and the depositors remained unpaid. *Courtney v. Halleran*, 2004 WL 2095674 (N.D. Ill. September 17, 2004).

FDIC's lawsuit against Ernst & Young. The FDIC eventually did sue the bank's accountants, Ernst & Young, on November 2, 2002, asserting that Superior's materially false financial statements manifested a pattern of book cooking by Ernst & Young, and accused the firm of concealing its wrongdoing in order to prevent the disclosure of Ernst's wrongdoing at Superior from impacting the accounting firm's then-pending $6 billion sale of its consulting division to Cap Gemini. The district court dismissed that action for lack of standing. *Federal Deposit Ins. Corp. v. Ernst & Young LLP*, 256 F. Supp. 2d 798 (N.D. Ill. 2003). The Seventh Circuit affirmed on different grounds, finding that the FDIC, who had sued in its corporate capacity ("FDIC-Corporate"), in order to avoid an arbitration clause in the Bank's agreement with Ernst, had, in its "corporate" capacity, no claim against the accountants. Instead, the Court of Appeals held, under *12 U.S.C. § 1821* the FDIC in its capacity as receiver ("FDIC-Receiver") is the correct plaintiff "to pursue any claim against Superior Bank's accountants." *FDIC v. Ernst & Young LLP*, 374 F.3d 579, at 583 (7th Cir. 2004). Accordingly, On July 6, 2004, the FDIC "as receiver" filed a Demand for Arbitration for money damages against E&Y. (R. 87, Ex. A).

FDIC's $125 million Settlement and Release Agreement with E&Y ripens plaintiffs' claims. On December 24, 2004, FDIC and OTS entered into two related Stipulation and Consent agreements with Ernst & Young, resulting in (i) payment by E&Y of $85 million to OTS, which OTS transferred to FDIC as receiver of Superior Bank. *Status Report of the FDIC*, ¶ 1(R. 80, *In the Matter of Ernst & Young LLP (Consent Order)* and (ii) payment of an additional $45 million to the FDIC. Thus, the FDIC realized a total recovery from Ernst & Young of $125 million.

Plaintiffs seek to enjoin the transfer of E&Y settlement money to Pritzker group. With that, Plaintiffs' Count V claim had "ripened," wherein District Judge Gottschall reinstated Count V, but denied Plaintiffs' request to stay and enjoin the transfer, believing such Court action to be barred by 12 U.S.C. § 1821(j), FIRREA's anti-injunction provision. App.. The Seventh Circuit initially granted Plaintiffs' request to stay the transfer, but then vacated and denied the request. Depositors' petition for stay to Mr. Justice Stevens was denied February 15, 2005.

The FDIC transfers $31.5 million to shareholder group while depositors are still $20.6 million short. After Plaintiffs' requested stay of the transfer was denied, the FDIC Receiver immediately wire transferred 25% of the E&Y recovery (or approximately $31.25 million) to the Pritzker affiliate Asworth Corporation, per the terms of the agreement. *Affidavit of John Davidovich*, attached as Exhibit A to *FDIC's Rule 56.1 Statement of Material Facts* (R. 122).

As of that date, the depositors remained approximately $20.6 million short of full payment. *Plaintiffs' Uncontested Statement of Material Facts*, ¶ 34 (R.124-2).[6] Even if the Pritzkers make full payment of their $360 million over 15 years under their agreement with the FDIC, depositors will still — in 2019! — remain approximately $10 million short of full payment on their accounts, and without interest. *Id.* ¶ 37 (R.124-2), while the Pritzker/Dworman group will be approximately $200 million ahead, without considering time value of money.

By its September 17, 2004 order and judgment (R. 74), the lower court dismissed with prejudice federal Count II (RICO), Count IV (aiding and abetting RICO violation), and Count V (Declaratory Judgment), and dismissed, without prejudice, Count I (Violation of the ICFA) and Count III (Violation of Section 30.1 of the Illinois Public Accounting Act) declining to exercise supplemental jurisdiction over these counts.

On October 1, 2004, Plaintiffs filed a motion to reconsider the lower court's September 14th order and September 16th judgment dismissing Counts II, IV, and V. (R. 77).

On February 1, 2005, the district court granted Appellants' reconsideration motion and reinstated the

---

6. As of December 9, 2007, the uninsured depositors remain unpaid $16.86 million, without considering interest on their claims from the date of the bank's closing. *See* FDIC Failed Bank website for Superior Bank: *http://www.fdic.gov/bank/individual/failed/superior.html* and for balance sheet reports of assets and remaining claims: *http://www.fdic.gov/bank/individual/failed/superiorbalsheet.html*

Count V claim, but denied the injunction, believing that 12 U.S.C. § 1821(j) prohibits the Court from enjoining the distribution, even when the FDIC is acting contrary to its explicit authority. (R. 100, 101).

Applicants immediately filed an emergency notice of appeal and jurisdictional statement the following day, February 2, 2005, (R. 102), and on February 3, 2005 requested that the district court, pursuant to Fed. R. Civ. P. 62(c) and/or (d), enter an injunction or stay pending appeal. (R. 104). On February 3, 2005, the district court denied Applicants' request for the reasons stated in her previous opinion denying Applicants' request for a preliminary injunction under 12 U.S.C. § 1821(j), because, as she viewed the matter, the FDIC was acting within its powers in entering into the 2001 Settlement and distributing assets. (R. 110; Tr. Vol. 2).

On February 4, 2005, Applicants moved the Seventh Circuit United States Court of Appeals for a temporary stay pending appeal to maintain the status quo, pursuant to Fed. R. App. Pro. 8(a). The Court entered an order temporarily staying the distribution of money received by the FDIC to the Pritzker/Dworman shareholders pending its review of Applicants' request for a temporary stay pending appeal. However, on February 11, 2005, without opinion, the court dissolved the temporary injunction it had entered, and denied Applicants' motion to maintain the status quo pending appeal.

On July 27, 2005, the lower court entered a final Order and Judgment, dismissing Count V of the Plaintiffs' Fourth Amended Complaint, denying Plaintiffs' Motion for Summary Judgment as Moot,

denying Plaintiffs' Motion for Joinder of the FDIC in its Receivership Capacity as Moot, and terminating the case. (R. 132, 133 and 134).

On August 18, 2005, Plaintiffs filed a timely notice of appeal of the district court's: (1) September 14, 2004 order, (2) February 1, 2005 order, and (3) July 27, 2005 order and judgment, pursuant to 28 U.S.C. § 1291. (R.135).

On May 7, 2007 a Seventh Circuit panel, believing itself to be addressing an issue of first impression, in spite of decisions it regarded as nonprecedential to the contrary, affirmed, in the belief that the FDIC's power to transfer assets of a failed bank gave it authority to distribute the proceeds of the settlement with the bank's accountants different than required by FIRREA's 12 U.S.C. § 1821(d)(11) priorities. *Courtney v. Halleran*, 485 F.3d 942 (7th Cir. May 7, 2007) (App. A). The Depositors' Petition for Panel Rehearing with suggestion for Rehearing *En Banc* was denied on July 12, 2007. (App. C).

REASONS FOR GRANTING THE PETITION

I. Review is necessary to declare that Congress' statutory payout priorities are mandatory, not subject to FDIC discretion; that the FDIC's § 12 U.S.C. § 1821(d)(2)(G) power to transfer assets of a failed bank does not permit it to distribute recoveries favoring shareholders over depositors, contrary to § 1821(d)(11)'s "absolute priority" statutory priorities. The decision below conflicts with decades of bankruptcy law precedent, as well as the Claims Court's limit on the FDIC's authority.

A. The FDIC's Statutory Powers and Functions.

Congress enacted FIRREA to "establish a comprehensive scheme for effectively administering claims resulting from failed [financial institutions]." *Brady Dev. Co., Inc., v. RTC*, 14 F.3d 998, 1002-1003 (4th Cir. 1994). When acting as FDIC-Corporate (FDIC-C), the FDIC insures the deposits of all insured depository institutions, 12 U.S.C. § 1821(a)(1)(A), with its primary duties involving administering the Bank Insurance Fund, 12 U.S.C. § 1811, and to pay insured depositors of a failed bank, 12 U.S.C. § 1821(f). In its receiver capacity as FDIC-R, the FDIC is charged with winding up a failed institution, as governed by 12 U.S.C. § 1821(d), collecting assets, paying debts and distributing proceeds all in accordance with the statute.

B. FIRREA's Absolute Priority Rule for distributions from FDIC Receiverships.

For well over 100 years, the federal courts have recognized the "absolute priority" rule in bankruptcy, liquidations and receiverships, under which each senior priority creditor must be paid in full before a junior creditor may receive any payment at all. *See Special Commentary: Construction and Application of Absolute Priority Rule in Confirmation of Plan Under Chapter 11 of Bankruptcy Code of 1978 (11 U.S.C.A. § 1129(b)(2))* 175 ALR Fed. 485, and cases cited therein.

In enacting FIRREA, Congress codified the "absolute priority" concept setting a depositor preference over shareholders. As initially enacted in 1989, the provision permitted payment to shareholders only "where funds remain after all depositors, creditors, other claimants, and administrative expenses are paid":

> (11) Distribution of Assets.—
>
> (A) Subrogated Claims; claims of uninsured depositors and other creditors.—The receiver shall—
>
> > (i) retain for the account of the Corporation such portion of the amounts realized from any liquidation as the Corporation may be entitled to receive in connection with the subrogation of the claims of depositors; and

(ii) pay to depositors and other creditors the net amounts available for distribution to them.

(B) distribution to Shareholders of amounts remaining after payment of all other claims and expenses.—In any case in which funds remain after all depositors, creditors, other claimants, and administrative expenses are paid, the receiver shall distribute such funds to the depository institution's shareholders or members together with the accounting report required under paragraph (14)(c). P.L. 101-73, 103 Stat. 183.§212(a).

The current provision, 12 U.S.C. § 1821(d)(11)(A), as amended by P.L. 103-66, § 3001(a) reordered the two-priority listing into five, and continued Congress' explicit direction that depositors come first:

12 U.S.C. § 1821(d)(11). Depositor preference

(A) In general

Subject to section 1815(e)(2)(C) of this title [relating to losses incurred by the FDIC], amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

> (i) Administrative expenses of the receiver.
>
> (ii) Any deposit liability of the institution.
>
> (iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).
>
> (iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).
>
> (v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

As relevant here, depositor liabilities (Priority 2) must be fully paid before any amounts are distributed to lower-level interest holders (*e.g.*, Priority 5 shareholders). Indeed, as under the Bankruptcy Code, the statutory payout priorities set by Congress are explicit, mandatory and not open to FDIC discretion in favor of lower priorities[7].

---

7. In interpreting the statutory provisions of FIRREA, courts often look to bankruptcy courts for guidance, as the two utilize similar congressional constructs for dealing with failed organizations; *i.e.*, bankruptcy for failed companies and FIRREA for failed banks. *See, e.g., National Union Fire Ins. Co. v. City Savings, F.S.b.*, 28 F.3d 376, 387 (3rd Cir. 1994)(turning to bankruptcy code for definition of "claim"); *Gaff v. FDIC*, 919 F.2d 384, 392 (6th Cir. 1990)(recognizing that the Bankruptcy Code does not govern bank failures, but finding the comparison of equitable subordination instructive regarding FIRREA).

C. The FDIC's general power to act as a receiver or transfer assets does not confer authority or discretion to distribute assets differently from the statutory priorities.

The FDIC's discretion in acting as receiver or handling the Bank's assets does not grant discretion in distributing recoveries. The Defendants, and the court below, both erroneously viewed § 1821(d)(2)(G) of FIRREA, "Merger; transfer of assets and liabilities," as allowing the FDIC to do whatever it wants with an "asset," including a recovery. Rather, this section only applies to situations where "a receiver transfers assets to another party who in turn assumes a responsibility for them, such as in the case of a bank merger." *Adagio Investment Holding Ltd. v. FDIC*, 338 F. Supp. 2d 71 (D.D.C. 2004)(entering summary judgment against the FDIC for acting outside of its statutory powers by attempting to reclassify depositors funds).

Adagio invalidated the FDIC's attempted evasion of the mandatory depositor preference by reclassifying insured and preferred demand deposit accounts as uninsured and nonpreferred international banking facility (IBF) funds. *Adagio*, 338 F. Supp. 2d at 73-74. As in *Adagio*, the FDIC's broad receiver powers under 12 U.S.C. § 1821(d)(2)(A)(I) priorities in collecting and administering the failed bank's assets are limited. Thus, "despite the receiver's significant authority to resolve the affairs of a failed bank, . . . FDIC-R does not enjoy *carte blanche*, for 'there is no federal policy that the [deposit insurance] fund should always win." *Id.* at 79-80 (citations omitted). And, like in *Adagio*, this Court must now hold that "despite its '800-pound gorilla' — like statutory powers, the FDIC overstepped its legal authority." *Id.* at 80.

Adagio considered, and rejected, the FDIC's argument that a "reclassification" right was somehow implicit in the FDIC's authority to "preserve and conserve assets of the institution", § 1821(d)(2)(B)(iv), "all necessary powers incidental to carrying out its specifically-granted powers as receiver," § 1821(d)(2)(J)(I), and even, like here, the argument that the bank can "transfer any asset or liability of the institution in default ... without approval, assignment, or consent with respect to such transfer," § 1821(d)(2)(G)(i)(II). *Id.* at 81. The Court held that none of these powers, however, gave the FDIC the right to reclassify deposits to the effect of "zeroing out the 'depositor's funds" as such action would be "antithetical to the FDIC's 'basic mission [which] is to protect insured depositors," *id.*, *citing E.I. du Pont de Nemours & Co.. v. FDIC*, 32 F.3d 592, 595 (D.C. Cir. 1994), and granted summary judgment against the FDIC *(clearly a restraint against the actions of the FDIC)* holding that the sweep of the plaintiffs' funds was neither authorized by plaintiffs nor by FDIC-R's statutory authority. *Id.* at 84.

As in *Adagio*, none of the broad general statutory authority empowers the FDIC to rearrange *specific* statutory distribution priority duties of 12 U.S.C. § 1821(d)(11)(A). Thus, the FDIC's authority to settle the Bank's claims against E&Y did not carry with it the authority to allocate its recovery different from § 1821(d)(11)(A)'s distribution priorities. Indeed, although it might have chosen to sell the claim to someone, possibly even to the Pritzkers[8], the proceeds of that sale would be governed, as well, by the § 1821(d)(11) priorities.

---

8. Such transfers to related parties, however, are subject to the heightened scrutiny of 12 U.S.C. § 1821(p).

Similarly, in the bankruptcy context, the Seventh Circuit rejected the argument that a general administrative authority to operate the debtor's business conferred any authority to override the statutory payment priorities, and overturned the bankruptcy court's approval of the debtor-in-possession's decision to pay "critical vendors" in full ahead of their statutory priority. *In re Kmart Corp.*, 359 F.3d 866, 869 (7th Cir. 2004). The court squarely rejected the notion that either the debtor-in-possession or the bankruptcy court possessed the authority to prefer some vendors over others in a manner contrary to the statutory priorities between creditor classes and parity within them. *Id.* at 872. Indeed, the strict priorities there governed, over a general provision which empowered the trustee generally (much like the receiver statutes relied upon by the Defendants) to "use, sell or lease, other than in the ordinary course of business, property of the estate." *Id.* at 872, *citing* 11 U.S.C. § 363(b)(1). Similar to the necessary outcome here, the Court held that the Bankruptcy Code does not permit altering the statutory priority scheme unless a statute supports such action; or, alternatively, if it can be shown that the disfavored creditors will be as well off with the reorganization of the priorities[9]. *Id.* at 872-873.

As applied here, § 1821(d)(11) priorities control–meaning no money to the priority five shareholders until the higher priority — priority two — depositors are paid-

9. The test (*i.e.*, that the class is no worse off by the proposed transaction than it would be on a straight liquidation and distribution of the proceed by statutory priorities) clearly could not be met here.

in-full. Like in bankruptcy, once the uninsured depositor plaintiffs' and the class' *claims* have already been approved (as they have here), the claimants have standing to assert whatever issues may arise.

II. The FDIC's Agreement with the Pritzker/Dworman shareholders is subject to court review because the FDIC's action was outside its authority.

Anticipating that respondents will challenge the court's authority to review the FDIC's actions, we argue here that court review is entirely appropriate.

A. Where the FDIC Acts Outside, or Contrary to, its Statutory Powers, Courts May Review and Remedy the FDIC's Actions.

As laid out long ago by this Court:

> It is emphatically the province and duty of the judicial department to declare what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803).

While the FDIC's powers may be broad,[10] the FDIC is a creature of statute with only the powers given it by Congress. Like other agencies, when it acts beyond its powers, it may be enjoined:

---

10. The FDIC's powers are enumerated at 12 U.S.C. § 1819.

> By its terms, § 1821(j) shields only "the exercise of powers or functions" Congress gave the FDIC; the provision does not bar injunctive relief where the FDIC has acted or purposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions.

National Trust for Historic Preservation v. FDIC, 995 F.2d 238, 240, 301 U.S. App. D.C. 338 (D.C. Cir. 1993) (citations omitted)[11].

Indeed, the cases are legion that when the FDIC acts beyond its authority, it is subject to injunction, regardless of any anti-injunction provision. *See, e.g., Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 573, 109 S. Ct. 1361, 103 L. Ed. 2d 602 (1989) (Under FIRREA's precursor, holding that FSLIC acted outside its powers by adjudicating state law claims); *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997) (holding that 1821(j) imposes no bar where the FDIC breaches settlement agreements at will).

---

11. In *FDIC v. Ernst & Young LLP*, 374 F.3d 579 (7th Cir. 2004), the Seventh Circuit alluded to the potential application of the Appropriations Clause of the Constitution, Art. I, § 9, cl. 7. to the FDIC's actions in this case, citing *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990). While this Court was referring to the difference between promising something contrary to statute and promised compliance with the statute, when the FDIC-Receiver obtained the $125 million settlement from Ernst & Young, its failure to pay according to statutory priorities because of a side agreement with the Bank's shareholders may have violated that same clause.

The defendants' assertions that "the future recovery in litigation not yet filed" is an "asset" of Superior Bank, but one that is subject to the FDIC's general control, unaffected by the statutory payout provisions is a creation without statutory support. Rather, the rule is that general statutory powers yield to specific statutory direction. *Matter of Hartman Bros. Constr. Corp.*, 835 F.2d 1215, 1217 (7th Cir. 1987) (holding that a specific provision regarding the duration of a tax lien prevailed over any general statutory language)(citation omitted).

To hold that the settlement assets recovered by the FDIC, as receiver for Superior, are not "amounts realized" is illogical, and cannot survive the plain language of § 1821(d)(11), not to mention FIRREA's purpose to protect depositors over errant shareholders. Indeed, the only decision over the meshing of the FDIC's function to marshal assets with payout of recoveries received from lawsuits for the bank squarely holds that *any* recovery on behalf of the bank must be distributed pursuant to the statutory priorities.

In *Plaintiffs in All Winstar-Related Cases at the Court v. United States*, 44 Fed. Cl. 3 (Fed. Cl. 1999), the FDIC sought to intervene in a series of lawsuits brought by shareholders against a failed bank. The FDIC sought to intervene and be substituted for the shareholders, as it was the true holder of the claims against the directors and owners of the bank. *Winstar*, 44 Fed. Cl. at 4-5. The Court, in allowing intervention, but not substitution[12],

12. The Court allowed shareholders to proceed with their suit, but noted that they would only be entitled to any "surplus" beyond any recovery required to be paid out according to the (Cont'd)

discussed the interplay of the FDIC's general powers over a failed bank's assets, and its necessity to pay out recovery from claims according to the statutory priorities:

> In combination, these statutory provisions establish that the FDIC, as receiver [], holds legal title to the assets of the bank (including claims) formerly owned by the failed thrifts and that ***any recovery based on the assertion of a claim of any such thrift must be distributed pursuant to the statutory order of priorities.***

Id. at 5-6 (emphasis added).

Here, the court below erred in holding that the future recovery against E&Y would be an asset controllable under the general statutory provisions, rather than what it clearly is — an amount realized from a settlement between the FDIC-R and the failed bank's accountants.

(Cont'd)
priorities of 12 U.S.C. § 1821(d)(11). *Winstar*, 44 Fed. Cl. at 10. Indeed, courts will condition the standing of persons to bring suit individually on the tenets of 12 U.S.C. § 1821(d)(11)(A), in that any recovery will produce a surplus in the receivership. *California Housing Securities, Inc. v. United States*, 959 F.2d 955, 957 n.2 (Fed. Cir. 1992).

B. Section 1821(j)'s bar of judicial review of FDIC action does not bar judicial review because the Statutory Preference for Depositors is mandatory by operation of Law.

Where, as here, the remedy sought by plaintiffs is "imposed by statute, automatically and by operation of law, without any action by a Court," equitable relief is appropriate. *Gross v. Bell Savings Bank PA SA*, 974 F.2d 403, 407 (3d Cir. 1992); *see also, In re Colonial Realty Co.*, 980 F.2d 125, 137 (2d Cir. 1992)(holding that the anti-injunction act does not prevent application of the automatic bankruptcy stay because it is "automatically applicable" to the FDIC).

In *Rechler Partnership v. Resolution Trust Corp.*, 1990 WL 711357 at *2 (D.N.J. Sept. 7, 1990), the plaintiff sought a declaratory judgment adjudicating the Resolution Trust Corporation responsibilities under FIRREA, 12 U.S.C. § 1821(e)(2), requiring the RTC to repudiate a lease agreement within a "reasonable period of time". *Id.*

The Court rejected the RTC's 1821(j) argument in like fashion, stating:

> The first point that must be stressed is that plaintiff does not ask the Court to restrain RTC's exercise of its statutory responsibilities but, as stated, asked for an interpretation of a federal statute. While it is true that the Court's interpretation will bind RTC and, thus, in a colloquial sense restrain it, the Court finds nothing extraordinary in such a result. To the contrary, it is a reflection of the fact that statutes are not self-executing. *Their meaning must*

> *always be subject to judicial interpretation*. This process is more a confirmation of the vitality of separation of powers than a violation of RTC's agency prerogatives.

Id. at *4 (emphasis added).

As discussed above, when the FDIC is acting outside the scope of its authority and contrary to its statutory duties, it is squarely this Court's authority, and responsibility, to declare the legality of those actions. Further, as in *Rechler*, even when the FDIC is acting *within* its powers, the Court may nonetheless interpret the statutory application and grant appropriate declaratory or equitable relief. *See also Chemical Futures*, 832 F. Supp. at 1192-93 (interpreting arbitration provisions, while potentially restraining the right to enter into arbitration, was not a restraint on RTC's rights as "section 1821(j) does not elevate the FDIC to the position of a sacred cow which may graze upon the rights of others at will, unchecked by the courts." (citation omitted)). Because there is a "clear distinction between the type of restraint caused by judicial interpretation and the restraints addressed by the statute," as in *Rechler*, the Applicants are simply asking this Court:

> pursuant to its Constitutional functions, to determine the meaning and application of a Congressional enactment to a particular factual situation.

Rechler, 1990 WL 711357 at *4.

This result is also fully supported by *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 573, 109 S. Ct. 1361,

103 L. Ed. 2d 602 (1989) (holding that a similar anti-injunction provision does not prohibit the Court from considering the validity of claims against the FSLIC); *see also Cummings*, 786 F. Supp. at 146 (holding that 1821(j) prevents courts from interfering with the functions of the FDIC, but not from "adjudicating whether a particular act is within the powers of the [FDIC] as a receiver").

III. Review is warranted to support the rule of law in Failed Bank Resolutions under FIRREA, and to declare that no "wealthy investor" exception exists to the liquidation priorities.

Review is necessary to reaffirm the fact that the United States banking system is not a third-world banana republic, in which the wealthy families may purchase themselves a separate treatment from the statutes enacted by Congress for all.

The FDIC's reversed loyalties in resolving Superior for the benefit of its influential and wealthy shareholders over its depositors was noted by both the press (*see* "Maybe they'll get a Toaster", Chicago Tribune editorial , January 29, 2005 at p. 22) and legal authorities as well. (Johnson, Christian A., Justice and the Administrative State: The FDIC and the Superior Bank Failure, 36 Loyola Univ. Chicago L. J. 483 (2005).

The decision below, that the FDIC may ignore the statutory priorities to divert bank resolution proceeds to wealthy and influential Bank shareholders over innocent depositors, ignoring the statutory distribution priorities, fundamentally offends all notions that the rule of law applies to failed bank resolutions. Indeed, the

FDIC's grant of a $31.5 million preferred dividend to the Pritzker/Dworman group (who loaned themselves $100 million from Superior and took out an additional $180 million in dividends based on concocted earnings) stands in stark contrast with the treatment of other notable bank manipulators; notably Bert Lance (whose paltry $5-6 million self-loans taken from the National Bank of Georgia/First National Bank of Calhoun resulted in his prosecution in the 1970s) and Charles H. Keating (prosecuted for his part in the 1980's collapse of American Continental/Lincoln Savings & Loan). This court has the ability to restore confidence in the government's administration of the federal banking system.

CONCLUSION

Wherefore, petitioners request that this court grant them a writ of certiorari to review the decisions of the courts below.

Respectfully submitted,

CLINTON A. KRISLOV
Counsel of Record
KRISLOV & ASSOCIATES, LTD.
20 North Wacker Drive
Suite 1350
Chicago, Illinois 60606
(312) 606-0500

GEORGE B. COLLINS
COLLINS & BARGIONE
One North LaSalle Street
Suite 2235
Chicago, Illinois 60602-3908
(312) 372-7813

JEFFREY M. FRIEDMAN
LAW OFFICE OF
JEFFREY FRIEDMAN, P.C.
120 South State Street
Suite 200
Chicago, Illinois 60603
(312) 357-1431

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED MAY 7, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 05-1244, 05-3500, 05-3642, 05-3651

JOHN W. COURTNEY, *et al.*,

Plaintiffs-Appellants, Cross-Appellees,

v.

NEAL T. HALLERAN, *et al.*,

Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 02 C 6926—**Joan B. Gottschall**, *Judge*,

ARGUED SEPTEMBER 25, 2006—DECIDED MAY 7, 2007.

Before BAUER, KANNE, and WOOD, *Circuit Judges*.

WOOD, *Circuit Judge*. This case was brought by frustrated depositors of Superior Bank FSB ("Superior") in an effort to recoup some of the money they lost when the bank failed. A class of plaintiffs, represented by John W. Courtney, Frances T. Lax, Lawrence M. Green, and Irene Kortas, charged that the defendant bank's owners, officers, directors, and accountants violated the federal Racketeer Influenced and

Appendix A

Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.*, the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* (CFA) and the Illinois Public Accounting Act, 225 ILCS 450/0.01 *et seq.*, through the actions they took while Superior was going under. The district court dismissed the RICO claims for lack of standing, and it dismissed without prejudice the supplemental state claims. It also initially dismissed a request for an injunction as unripe, but on reconsideration it denied the motion, finding that the requested relief would violate the prohibition in the banking laws on judicial interference with actions of the Federal Deposit Insurance Corporation. See 12 U.S.C. § 1821(j). Although the plaintiffs urge us to revive some or all of this litigation, we conclude that the district court resolved matters correctly, and we therefore affirm.

I

During the latter part of the 1980s, more than a thousand savings and loan associations in the United States failed. See "Savings and Loan Crisis," http:// en. wikipedia. org/ wiki/ Savings_ and_ Loan_crisis (visited April 24, 2007); Fed. Deposit Ins. Corp., "The S & L Crisis: A Chrono-Bibliography," http:// www. fdic. gov/ bank/ historical/ s & l/ (FDIC Chronology) (visited April 24, 2007). The rate of failure was so great that the General Accounting Office[1] (GAO) declared the Federal Savings & Loan Insurance Corporation (FSLIC) fund insolvent by at least $3.8 billion

1. As a result of the GAO Human Capital Reform Act of 2004, Pub.L. 108-271, 118 Stat. 811 (2004), the name of the agency was changed to the Government Accountability Office. We refer to it here under the name it had at the time.

in January 1987. See FDIC Chronology. During this crisis, the Federal Deposit Insurance Corporation (FDIC) had organized a program that permitted the consolidation of several failing or failed thrift organizations into one larger entity, which (the FDIC hoped) would enjoy greater economies of scale and which would be eligible for significant government assistance. See *LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1366-67 (Fed.Cir.2003). It dubbed this the "Phoenix program." See *id.* at 1366.

One of the institutions that failed was the Lyons (Illinois) Savings Bank, which went under in December 1988. Taking advantage of the Phoenix program, a group of investors including Penny Pritzker, Thomas Pritzker, and Alvin Dworman, through a holding company called Coast-to-Coast Financial Corporation (CCFC), acquired Lyons at the end of 1988. The group paid $42.5 million of its own money, and it received assistance from the FSLIC, which contributed a package of cash, tax credits, and loan guarantees worth $645 million. The Pritzkers (together) and Dworman each owned 50% of CCFC; CCFC in turn created a company called Superior Holdings, Inc., which was the nominal owner of the successor bank, Superior Bank FSB. As the district judge did, we refer to the owners as the CCFC defendants or group. The term "Bank defendants" refers to the officers and directors of Superior.

After the take-over, Superior began accumulating high-risk assets associated with retained interests in mortgage securitizations. Essentially, Superior would make a high-risk loan to an auto or home buyer with a poor credit history;

it then pooled groups of these loans and sold the portfolios to investors. Superior then collected the income due from the underlying loans, and paid a fixed rate of return to the investors. This was capable of being a winning strategy as long as Superior correctly estimated the rate of default or prepayment of the underlying loans, and as long as it was not obligated to pay too high a fixed rate to its investors.

The plaintiffs were depositors of Superior. They claim that the CCFC group plundered Superior's assets by withdrawing excessive amounts of money from the bank and by engaging in self-interested transactions with it. For example, they charge that the CCFC principals took out large loans from Superior that they had no intention of repaying, and that they drained Superior's assets by directing Superior to pay CCFC $188 million in dividends over the ten-year period from 1989 to 1999. Eventually, Superior was not able to withstand the alleged financial hemorrhage and it was forced to declare insolvency. (This is the second time that this court has been asked to consider aspects of that collapse. See *FDIC v. Ernst & Young LLP*, 374 F.3d 579 (7th Cir.2004).)

According to plaintiffs, the CCFC group initially was able to conceal its misfeasance in several ways. First, its auditors, the accounting firm of Ernst & Young, allegedly cooperated in the cooking of Superior's books so that they reflected vastly inflated values for the bank's assets. Based on Ernst & Young's purported conclusions, the CCFC group and the Bank defendants made statements to depositors designed to assure them that Superior was financially sound. Plaintiffs also allege that the Bank defendants misrepresented

the availability of FDIC insurance to existing and potential depositors. They charge that the Bank defendants told them that if they opened up multiple accounts in different names, then each account would be insured up to the maximum permitted by the FDIC. This was inaccurate, but, in reliance on this advice, the plaintiffs say that they were duped into depositing far more than the maximum that could be insured, just when Superior was about to fold.

By 1998, Superior's alleged mismanagement could no longer be ignored. The Office of Thrift Supervision (OTS) and the FDIC began to investigate, and they determined that several of Superior's audited financial statements significantly overstated the value of its assets. In January 2001, Ernst & Young conceded that its accounting treatment of Superior's retained interests was incorrect, and it agreed to re-evaluate its conclusions. That led to a writedown of Superior's retained interests first by $270 million, and later by another $150 million. Insolvency followed soon thereafter; on July 27, 2001, the OTS appointed an FDIC receiver for Superior. The receiver transferred all insured deposits (that is, accounts that had up to $100,000 in them) to a new entity, Superior Federal, and it retained $49 million of uninsured deposits. As of the time the plaintiffs filed their lawsuit, Superior was still unable to refund those uninsured deposits.

The FDIC eventually settled Superior's claims against CCFC's principals for $460 million, of which $100 million was to be paid immediately and the remaining $360 million was to be paid over a 15-year period. Those monies are to be distributed in accordance with the federal statutory priority scheme, under which the plaintiff depositors will recover

some, but not all, of their investments. See 12 U.S.C. § 1821(d)(11)(A). Plaintiffs are dissatisfied with the results of the settlement. They go further, in fact, and claim that the settlement itself violates the statute. They object to a feature under which the FDIC agreed with the CCFC group jointly to pursue the misrepresentation claims against Ernst & Young. If, and to the extent that, the FDIC prevailed in that suit, it agreed to assign the Pritzker/Dworman parties a percentage of its recovery. In the plaintiffs' view this arrangement was a thinly disguised way of circumventing the statutory priority scheme and allowing the CCFC group to get more than its proper share.

Acting in its corporate capacity, the FDIC filed a lawsuit against Ernst & Young on November 2, 2002. The district court dismissed that action for lack of standing. This court affirmed on different grounds, finding that the FDIC in its corporate capacity ("FDIC-Corporate") had no claim against the accountants. Instead, we held, under 12 U.S.C. § 1821 the FDIC in its capacity as receiver ("FDIC-Receiver") is the correct plaintiff "to pursue any claim against Superior Bank's accountants." *FDIC v. Ernst & Young LLP,* 374 F.3d at 583. No further actions the FDIC may have taken in any capacity are relevant to the present case.

II

After an initial foray into state court, plaintiffs found themselves in federal court when the defendants removed the case. Successive rounds of pleadings culminated in a

Appendix A

Fourth Amended Complaint, in which the plaintiffs asserted the following legal theories against the various defendants:

> Count I: Violations of the Illinois Consumer Fraud Act by the CCFC group, the Bank defendants, and Ernst & Young
>
> Count II: Violations of RICO, 18 U.S.C. § 1962(c), against CCFC and Ernst & Young
>
> Count III: Violation of the Illinois Public Accounting Act, § 30.1, against Ernst & Young
>
> Count IV: Aiding and abetting a violation of RICO, against Ernst & Young
>
> Count V: Action for injunctive relief and a declaratory judgment, against the Pritzkers, Dworman, and the FDIC, seeking declaratory and injunctive relief designed to enforce the plaintiff depositors' priority under 12 U.S.C. § 1821(d)(11)(A) over any assets recovered on behalf of Superior.

The district court dismissed the two RICO counts (II and IV) with prejudice, finding that plaintiffs lacked standing to sue; it initially rejected Count V as unripe, but later denied the requested declaratory and injunctive relief as precluded by 12 U.S.C. § 1821(j); and it dismissed the supplemental state claims in Counts I and III without prejudice. After plaintiffs filed a notice of appeal from the denial of injunctive relief, this court briefly stayed the distribution of the Ernst

& Young settlement proceeds to the shareholders of CCFC, but we dissolved the stay a week later. The district court entered its final judgment on July 27, 2005, and this appeal followed.

III

A

We begin with a discussion of Count V of the complaint, because that is the one that the plaintiffs have emphasized before this court. They claim, in brief, that the FDIC's agreement about the disposition of potential proceeds from its suit against Ernst & Young violates the mandatory distribution priorities established by the Financial Institutions Reform Recovery and Enforcement Act (FIRREA), Pub.L. 101-73, 103 Stat. 183, the pertinent part of which is codified at 12 U.S.C. § 1821(d)(11). They argue that a private party is entitled to an injunction against the FDIC when the agency fails properly to implement the distribution priorities of § 1821(d)(11), notwithstanding the anti-injunction provision of FIRREA, 12 U.S.C. § 1821(j). Finally, they argue that any amounts realized by the FDIC in its capacity as Superior's receiver are necessarily subject to the distribution priorities of § 1821(d)(11). They offer three arguments in support of their position: first, that the FIRREA priority scheme is functionally identical to priorities under the Bankruptcy Code, and thus bankruptcy cases requiring strict adherence to priorities dictate the outcome here as well; second, that the FDIC's authority as conservator or receiver to transfer assets without obtaining any special approval or consent under § 1821(d)(2)(G) is qualified by the priority scheme of

§ 1821(d)(11); and third, that funds recovered through litigation or settlement should be treated as "amounts realized . . . [by] other resolution" under § 1821(d)(11)(A). The FDIC, the Pritzkers, and Dworman parry with several arguments: there is no private right of action to enforce § 1821(d)(11); section 1821(j) squarely precludes granting declaratory, injunctive, or other equitable relief where such relief would interfere with the receiver's management of the estate; and there is no violation of the § 1821(d)(11) priorities in any event.

We begin our evaluation of these claims with a look at the pertinent statutory language. Four parts of § 1821 are implicated, the key parts of which we set forth here for ease of reference:

> **§ 1821(d)(2)(G). Merger; transfer of assets and liabilities**
>
> (i) In general
>
> The Corporation may, as conservator or receiver—
>
> . . . **(II)** subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer. . . .

Appendix A

§ 1821(d)(11). Depositor preference

(A) In general

Subject to section 1815(e)(2)(C) of this title [relating to losses incurred by the FDIC], amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

(i) Administrative expenses of the receiver.

(ii) Any deposit liability of the institution.

(iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).

(iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).

(v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company). . . .

Appendix A

§ 1821(j). Limitation on court action

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver. . . .

§ 1821(p)(3). Settlement of claims

Paragraphs (1) [prohibiting the sale of assets of a failed institution to certain persons] and (2) [forbidding debtors convicted of certain crimes from buying assets] shall not apply to the sale or transfer by the Corporation of any asset of any insured depository institution to any person if the sale or transfer of the asset resolves or settles, or is part of the resolution or settlement, of—

(A) 1 or more claims that have been, or could have been, asserted by the Corporation against the person; or

(B) obligations owed by the person to any insured depository institution, the FSLIC Resolution Fund, the Resolution Trust Corporation, or the Corporation.

Although the FDIC and the CCFC defendants would like us to sweep this claim away by finding that there is no private right of action to enforce the priority scheme established by § 1821(d)(11), we prefer not to take that approach. We are

not compelled to consider this issue, because it relates only to the question whether the plaintiffs have stated a claim, not to the question of the district court's jurisdiction. The district court did not rule on it, and it is sufficiently complex, compare *Hindes v. FDIC*, 137 F.3d 148, 170 (3d Cir.1998) (no private right of action under § 1821(d)(13)(E)), with *First Pac. Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1127 (9th Cir.2000) (finding private right of action under § 1821(d)(15) and acknowledging conflict with *Hindes*), that it should not be handled as some kind of after-thought. Furthermore, since we have concluded that plaintiffs' claims were properly dismissed, this would at most be an alternative ground for decision. We therefore save the question whether any kind of private right of action exists under § 1821 for another day. In addition, we express no opinion on the FDIC's alternative argument that plaintiffs' failure to exhaust administrative remedies is fatal to their claims. See 12 U.S.C. § 1821(d)(3)(13)(D); *Am. First Fed., Inc. v. Lake Forest Park, Inc.*, 198 F.3d 1259, 1265 (11th Cir.1999); *Maher v. Harris Trust & Sav. Bank*, 75 F.3d 1182, 1190 (7th Cir.1996). Recall that the district court had originally dismissed Count V as unripe; on reconsideration it relied exclusively on the bar against injunctive relief found in § 1821(j), to which we are about to turn. We see no reason why we should be compelled to consider exhaustion before § 1821(j), and thus we express no opinion on the plaintiffs' arguments that they have done enough to exhaust and that exhaustion does not apply under these circumstances.

The glaring problem with the plaintiffs' overall position on this part of the case lies in the anti-injunction language of § 1821(j). That section prohibits a court from taking any

action either to restrain or affect the FDIC's exercise of its powers as a receiver, unless authorization can be found elsewhere in the section. Far from finding such an authorization, however, we see nothing but language that reinforces § 1821(j). For example, § 1821(p)(3) permits the FDIC to sell or transfer assets as part of a settlement of claims that it could have asserted against someone. Section 1821(d)(2)(G)(i)(II) permits the FDIC to transfer assets or liabilities without any further approvals.

Other courts have recognized the breadth of § 1821(j)'s prohibition. The Ninth Circuit described the ban as an essential part of the FDIC's ability to function as a receiver. *Sahni v. Am. Diversified Partners*, 83 F.3d 1054, 1058 (9th Cir.1996). The D.C. Circuit said that § 1821(j) "effect[s] a sweeping ouster of courts' power to grant equitable remedies to parties like the [plaintiffs]." *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C.Cir.1995). Indeed, the court went on to make a point equally important to the case before us, in discussing whether the prohibition also reaches declaratory relief and other equitable relief:

> Not only does [§ 1821(j)] bar injunctive relief, but in the circumstances of the present case where appellants seek a declaratory judgment that would effectively 'restrain' the FDIC from foreclosing on their property, § 1821(j) deprives the court of power to grant that remedy as well. . . . For the same reason, § 1821(j) also bars the court from granting the [plaintiffs'] plea for rescission of the underlying transaction.

Id. See also *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 715 (8th Cir.1996) (reaching the same conclusion).

The plaintiffs try to avoid this significant obstacle to their suit by arguing that § 1821(j) cannot apply to actions of the FDIC that are *ultra vires*. First, they claim that the FDIC is rigidly bound to the priority structure set forth in § 1821(d)(11), just as a bankruptcy court is bound by the priorities established by the Code. In *In re Kmart Corp.*, we wrote that the general power conferred on a bankruptcy court by 11 U.S.C. § 105(a) "does not create discretion to set aside the Code's rules about priority and distribution; the power conferred by § 105(a) is one to implement rather than override." 359 F.3d 866, 871 (7th Cir.2004). So too here, plaintiffs argue. But the plaintiffs conveniently ignore the fact that this court rejected the K-Mart plan because it did *949 not meet the statutory requirements for the prioritization scheme it had selected and no other statute authorized the change in prioritization. *Id.* at 874. The problem was not that the court was powerless to allow a change in prioritization for *any* reason. *Id.* Here, the FDIC had specific statutory authorization for its actions. It has the power, under § 1821(d)(2)(G), to direct where funds should go. Bankruptcy law does not contain an analogous provision, and thus we do not find the plaintiffs' analogy to be particularly useful.

Plaintiffs object that § 1821(d)(2)(G) must be read in tandem with § 1821(d)(11)'s priority scheme. The FDIC's power to order transfers, they continue, may be exercised only if it observes the priority structure of the latter statute in designating the recipient. As support for their position, they cite only the district court's decision in *Adagio*

Investment Holding Ltd. v. FDIC, 338 F.Supp.2d 71 (D.D.C.2004). Aside from the fact that *Adagio* deals with an entirely different situation-the sweep of funds from one set of insured accounts to another set of uninsured accounts, all within the same bank-it is of course not binding on this court. As we see it, plaintiffs are reading language into § 1821(d)(11) that is not there-essentially, they have equated transfers of existing assets with the disposition of amounts received upon "liquidation or other resolution" of an institution. In our view, § 1821(d)(11) cannot be read to limit the FDIC's authority under § 1821(d)(2)(G)(i)(II) so significantly. In addition, we note that the FDIC promised in *Ernst & Young* to apply any recovery it obtains from the accounting firm in accordance with the statutory priorities. 374 F.3d at 582. It is not clear why plaintiffs regard that as insufficient to protect their interests, but the premise of this lawsuit is that more is needed for legal security. We therefore continue with our consideration of their arguments.

The next question is whether the part of the FDIC's potential recovery from Ernst & Young that is dedicated to the CCFC interests should be viewed as a future asset of the estate that must be liquidated in accordance with § 1821(d)(11), or if it is better conceptualized as something the estate never had at all. Plaintiffs argue that the fact that these (still-hypothetical) monies will pass through the FDIC's hands on the way to the recipients means that their disposition must be governed by federal law. They point to a decision of the U.S. Court of Federal Claims, *First Annapolis Bancorp., Inc. v. United States,* 54 Fed.Cl. 529 (Fed.Cl.2002), in support of their position. Putting aside the facts that this decision, too, comes from a trial court whose rulings are

nonprecedential and that ultimately the court rejected the FDIC's suit for lack of a case or controversy, *First Annapolis* does not help us resolve the question before us. We must decide what to do when damages are yet to be collected in the future, and if and when they are collected, they will simply flow through the FDIC's hands to the ultimate recipient.

Two reasons persuade us that the FDIC was entitled to structure its settlement with the CCFC parties in the way that it did. First is its general power to settle with alleged wrongdoers under § 1821(p)(3)(A), which must operate independently of § 1821(d)(11)(A) if it is to mean anything at all. We also note that both the FDIC, in its capacity as Superior's receiver, and the CCFC parties had independent claims that they were entitled to assert against Ernst & Young. Had they never agreed to the settlement, there is no way that plaintiffs could have relied directly on FIRREA's provisions to get any part of a possible CCFC recovery. (We do not exclude other theories, but plaintiffs have asserted various other theories in the present lawsuit against the CCFC parties; the source of the funds that the defendants might use to satisfy plaintiffs' claims is presumably not a matter of great interest to them, as long as they know that enough money is there.)

We conclude, therefore, that the district court correctly rejected the plaintiffs' request in Count V for declaratory relief, injunctive relief, and other equitable relief.

B

The district court dismissed Counts II and IV, the two that are based on RICO, for lack of standing under the statute.

The basic problem is not, however, standing, for the reasons we explained in *FDIC v. Ernst & Young,* 374 F.3d at 581-82. It is whether the depositors are entitled under RICO to bring a direct action against an insolvent bank's shareholders and accountants in a case like this, or if such a claim belongs exclusively to the FDIC at this point. FIRREA provides that "the [FDIC] shall, as conservator or receiver, and by operation of law, succeed to (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, *account holder, depositor,* officer, or director of such institution with respect to the institution and assets of the institution." 12 U.S.C. § 1821(d)(2)(A) (emphasis added). Although this court has not spoken to the issue, both the Ninth and the Third Circuits have concluded that the depositors were not entitled to pursue their own RICO claim. *Hamid v. Price Waterhouse,* 51 F.3d 1411, 1419-20 (9th Cir.1995); *Popkin v. Jacoby (In re Sunrise Sec. Litig.),* 916 F.2d 874, 880 (3d Cir.1990). The *Hamid* court reasoned that, just as in the case of a shareholder derivative action, where the harm has been suffered by all depositors equally and plaintiffs have not suffered any distinct individual injury, the claim belongs to the institution (or its successor, the FDIC). 51 F.3d at 1419-20.

Although the plaintiffs urge that they meet that last criterion—injury unique to each person-they are talking about something different. Even if each depositor suffered different amounts of loss, the general misrepresentations alleged affected everyone in the same way. We have explained before that a "direct injury" for these purposes is an "injury independent of the firm's fate." *Mid-State Fertilizer Co. v. Exchange Nat'l Bank,* 877 F.2d 1333, 1336 (7th Cir.1989).

Plaintiffs' injuries were entirely dependent on the bank's fate. The district court was therefore correct in substance to conclude that these plaintiffs were not the parties entitled by the statute to pursue any potential RICO claim.

C

Finally, both parties challenge the district court's resolution of the supplemental claims raised in Counts I and III. Plaintiffs would obviously like to see them restored, along with the federal claims they have asserted; defendants wish that the district court had retained them and resolved them favorably to defendants, instead of dismissing them without prejudice under 28 U.S.C. § 1367(c)(3). Because we have rejected the plaintiffs' federal claims, there is nothing more we need to add about the dismissal of their state claims. They are entitled, if they wish and are able to do so under state law, to pursue those matters in state court. Defendants believe that the district court's action was an abuse of discretion because banking law is heavily regulated at the federal level. In those circumstances, they argue, there should be a greater presumption in favor of keeping the case in federal court even after claims that genuinely arise under federal law are gone.

That assumes, of course, that there is no original federal question jurisdiction over the state claims in Counts I and III. Defendants argue that this is wrong, and that we should find that federal law has entirely displaced state law in this area. This has become a popular argument of late, see *Bennett v. Southwest Airlines Co.*, 2007 WL 1215055 (7th Cir. Apr.26, 2007), but in this case it is easy to reject it. The Supreme

Court held in *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996), that state banking laws are not preempted if they "do[ ] not prevent or significantly interfere with the national bank's exercise of its powers." *Id.* at 33, 116 S.Ct. 1103. If state banking laws are not preempted, there is even less reason to think that federal banking laws preempt state laws of general applicability like the Illinois Consumer Fraud Act or the Public Accounting Act. Regulations issued by the Office of Thrift Supervision of the Department of the Treasury confirm that conclusion: "State laws of [contract and commercial law and tort law] are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations." 12 C.F.R. § 560.2(c).

To the extent that we are dealing with conflict preemption, this is one of the many areas in which the district court was entitled to conclude that the state courts would faithfully apply whatever federal laws and regulations may be implicated by this case.

IV

We have considered the other arguments that the parties have presented and find nothing that requires comment. The judgment of the district court should be Modified to reflect the fact that the RICO counts are dismissed on the merits, not for lack of standing; in all other respects, the judgment of the district court is AFFIRMED.

Appendix A

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case Number: 02 C 6926

Courtney

v.

Halleran

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Count V of plaintiffs' fourth amended complaint is dismissed. Plaintiffs' motion for summary judgment [98] is denied. Defendants' motion for reconsideration [76] is denied. Plaintiffs' motion for joinder [88] is denied. Defendant FDIC's motion to supplement [91] is granted. This case is terminated.

Appendix B

Michael W. Dobbins, Clerk of Court

/s/ Rhonda Johnson, Deputy Clerk

Date: 7/27/2005

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JULY 27, 2005

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 02 C 6926

Judge Joan B. Gottschall

JOHN W. COURTNEY, FRANCES T. LAX, LAWRENCE M. GREEN, and IRENE L. KORTAS, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

NEAL T. HALLERAN, et al.

Defendants.

ORDER

On February 1, 2005, this court granted plaintiffs' motion for reconsideration in part and denied plaintiffs' motion for preliminary injunction, holding that 12 U.S.C. § 1821(j) precluded the court from granting the plaintiffs' requested injunction against disbursement of funds under the "2001 Settlement" between the FDIC and CCFC's principals.

Appendix C

Courtney v. Halleran, No. 02 C 6926, 2005 U.S. Dist. LEXIS 3907 (N.D. Ill. Feb. 1, 2005) (the "February Order").[1] After issuance of the February Order, plaintiffs filed a motion for summary judgment on count V of its fourth amended complaint, which requests a declaratory judgement that the 2001 Settlement violates 12 U.S.C. § 1821(d)(11)'s priority system for disbursing the assets of insolvent banks.

The CCFC Defendants correctly point out that by virtue of the February Order's granting plaintiffs' motion for reconsideration with respect to count V, their motion to dismiss (as well as separate motions to dismiss filed by other defendants) are still before the court with respect to count V. Also outstanding are: (i) plaintiffs' motion for joinder of several additional defendants; and (ii) the CCFC Defendants' and Bank Defendants' joint motion for reconsideration.

For the reasons set forth below, the court grants the CCFC Defendants' motion to dismiss count V. Plaintiffs' motion for summary judgment as to count V is denied as moot. Plaintiffs' motion for joinder is denied as moot. The CCFC Defendants' and Bank Defendants' joint motion for reconsideration is denied.

---

1. Previous to the February Order, the court issued an order on September 14, 2004 dismissing all of plaintiffs' federal claims not discussed in this order. *Courtney v. Halleran*, No. 02 C 6926, 2004 U.S. Dist. LEXIS 18795 (N.D. Ill. September 14, 2004) (the "September Order"). The February Order and September Order discuss the background of this case in detail, and the court presumes familiarity with them for purposes of this order. Capitalized terms herein that are not otherwise defined have the meaning ascribed to them in the February Order.

Appendix C

Analysis

As the court described in the February Order, 12 U.S.C. § 1821(j) precludes it from ordering equitable relief on count V. To get around this, plaintiffs argue that § 1821(j)'s prohibition on equitable relief does not extend to their requested declaratory judgment on this count, claiming that "this Court has the power to adjudicate the agreement's [2001 Settlement's] legality." (Mot. S.J. at 3, citing *Rechler v. RTC*, No. 90-3091, 1990 WL 711357, at *3-*4 (D.N.J. Sep. 7, 1990) and *Adagio Investment Holding, Ltd. v. FDIC*, 338 F.Supp. 2d 71, 82-84 (D.D.C. 2004).)[2] While it is true that declaratory relief is not technically "equitable" in nature (see *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 299 F.3d 643, 649 (7th Cir. 2002) for a discussion), § 1821(j)'s prohibition on the court taking "any action . . . to restrain or affect the exercise or powers or functions of the [FDIC] as a conservator or receiver" prohibits the court from declaring the 2001 Settlement to be in violation of § 1821(d)(11).

Appellate courts discussing this issue have disposed of it quickly. For example, in *National Trust for Historic*

---

2. As noted in the February Order, the court has already declined to follow *Adagio*. With respect to *Rechler*, that case is not applicable here. As discussed below, the court bases its decision on the fact that to issue a declaratory judgment would have the effect of interfering with the substantive exercise of the FDIC's powers as receiver, and even *Rechler* recognizes that § 1821(j) mandates that "this Court cannot interfere in the substantive decisions the RTC [or FDIC] must make when fulfilling its Congressional mandate." 1990 WL 711357, at *4.

Preservation v. FDIC, 21 F.3d 469, 471 n.2 (D.C. Cir. 1994), the court stated:

> *California v. Grace Brethren Church*, 457 U.S. 393 (1982), forecloses appellants' argument that § 1821(j) does not bar its suit to the extent it is seeking a declaratory judgment rather than an injunction. There is, the Court ruled, so "little practical difference between injunctive and declaratory relief' that a statute barring injunctions will also have the effect of barring declaratory judgments. 457 U.S. at 408-09; *see also Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985).

Other controlling cases exhibit similar holdings. *See, e.g., National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 591 (1995) (where declaratory relief would disrupt a government agency's complained-of action, a statutory prohibition on injunctive relief extends to declaratory relief.) Here, if the court were to declare (as plaintiffs request) that the 2001 Settlement was concluded by the FDIC in violation of § 1821(d)(11)'s priority-of-payment system, it would "affect the FDIC's continued functioning as receiver and it effectively would throw into question every act of FDIC-Receiver." *Hindes v. FDIC*, 137 F.3d 148, 161 (3rd Cir. 1998) (holding that § 1821(j)'s prohibition on injunctive relief extends to declaratory relief). The FDIC's actions in agreeing to the 2001 Settlement were fundamental to the disposition of Superior's assets, and hence were an integral exercise of the FDIC's power as receiver of Superior. February Order, at *11-*12.

Appendix C

A declaratory judgment striking at the heart of the 2001 Settlement would thus have a "dramatic and fundamental" effect on the exercise of the FDIC's powers as receiver, and is precluded by § 1821(j). *Hindes*, at 161; *National Private Truck Council*, 515 U.S. at 590. Thus, count V of the plaintiffs' fourth amended complaint is dismissed for failure to state a claim upon which relief may be granted.

CCFC and Bank Defendants' Joint Motion for Reconsideration

In the September Order, having dismissed all of plaintiffs' federal claims, the court relinquished jurisdiction over plaintiffs' state law claims. Citing *Wright v. Assoc. Ins. Cos.*, 29 F.3d 1244 (7th Cir. 1994), the CCFC Defendants and Bank Defendants request reconsideration of that ruling, arguing that considerations of judicial economy, convenience, fairness and comity indicate that the court should retain jurisdiction over plaintiffs' remaining state law claims. The court rejects this argument; plaintiffs' federal claims have been dismissed under Fed. R. Civ. P. 12(b); procedurally speaking, the case is still in its early stages (judicial economy, convenience). The case was originally filed in state court, and counts under state law are all that remain; clearly the state courts are in the best position to analyze exclusively state claims (convenience, fairness, comity). The motion for reconsideration of the CCFC Defendants and Bank Defendants is denied.

Appendix C

ENTER:

_____s/_____
JOAN B. GOTTSCHALL
United States District Judge

DATED: July 27, 2005

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 20, 2007

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 12, 2007

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Nos. 05-1244, 05-3500, 05-3642, and 05-3651

JOHN W. COURTNEY, et al.,

Plaintiffs-Appellants/
Cross-Appellees,

v.

NEAL T. HALLERAN, et al.,

Defendants-Appellees/
Cross-Appellants.

Appendix D

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 02 C 6926

Joan B. Gottschall, *Judge*.

ORDER

Plaintiff-Appellants filed a petition for rehearing and rehearing en banc on June 21, 2007. No judge[1] in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to DENY rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing and rehearing *en banc* are DENIED.

A True Copy:
Teste:

s/ [illegible]
Clerk of the United States
Court of Appeals for the
Seventh Circuit

---

1. Judge Joel M. Flaum took no part in the consideration of this matter.